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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1946

No. 474

BURT CAIN,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Ninth Circuit
and
## BRIEF IN SUPPORT THEREOF.

SIMEON E. SHEFFEY,
300 Montgomery Street, San Francisco 4, California,
*Attorney for Petitioner.*

... Printing Co., San Francisco, California

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## PETITION FOR A WRIT OF CERTIORARI
## To the United States Circuit Court of Appeals
## For the Ninth Circuit.

*To the Supreme Court of the United States, and to the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

### JURISDICTIONAL STATEMENT.

1. The law believed to sustain the jurisdiction of the petition herewith presented is Section 240 Judicial Code (28 U.S.C.A. Sec. 347), the pertinent provisions applicable to said petition reading:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United

States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

2. The judgment sought to be reviewed herein was rendered by the United States Circuit Court of Appeals, Ninth Circuit, on May 16, 1946 (P. R. 326 et seq.), affirming a judgment of the United States District Court for the Northern District of California, Southern Division (P. R. 23) and a rehearing was denied by said Circuit Court July 16, 1946. (P. R. 333.) The time for the filing of the petition herein was extended by order of the above entitled Court to the 14th day of September, 1946.

3. The decision sought to be reviewed involves the question of petitioner's guilt under an indictment and conviction of conspiracy tried before the United States District Court for the Northern District of California, Southern Division.

Petitioner respectfully submits that this petition and the matter set forth therein are within the jurisdiction of this Court.

Dated, San Francisco, California,
September 6, 1946.

SIMEON E. SHEFFEY,
*Attorney for Petitioner.*

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1946

No.

BURT CAIN,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
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## PETITION FOR A WRIT OF CERTIORARI

*To the Supreme Court of the United States, and to the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petition of Burt Cain respectfully shows to this Court:

### I.

### SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED IN THIS CASE.

Petitioner herein, together with the other accused named in the indictment were tried and convicted of a conspiracy to sell whiskey at over-ceiling prices.

In January, 1944, Charles Malaby, Nathan and Morris Newman decided to go into the business of buying and selling whiskey wholesale. Morris Newman was not named in the indictment involved herein. For this business they required a wholesaler's liquor license or some one who had such a license through whom they could buy and sell. Some unsuccessful efforts were made by Malaby and the Newmans to obtain a connection with some one who had such license in San Francisco, and during such time Malaby and the Newmans were taking orders for wholesale lots of whiskey and were collecting moneys on said lots at over-ceiling prices.

For some time prior to 1944, Cain had been in the liquor business, importing liquors from Mexico. In this connection he had applied for and had obtained a wholesale liquor license. About March 15th to 20th, 1944, Nathan Newman met Cain for the first time and made arrangments to buy through Cain, as the wholesaler, a carload of "McHenry Reserve" brand of whiskey from the Midvalley Distillery in Pennsylvania. The whiskey was ordered and shipped to the International Import Company at Los Angeles. The name "International Import Company" was the name under which Cain was doing business and the name under which he held his license.

About March 22, 1944, Malaby went from San Francisco to Los Angeles, met Cain for the first time and received two letters authorizing him to sell whiskey on behalf of International Import Company. These letters are Government's Exhibits 22 and 22-A.

(P. R. 259.) At the same time Malaby signed a document (Defendants' Exhibit D, P.R. 216), whereby Malaby agreed to work as a salesman for International Import Company and agreed "to obey any and all Federal, State and listed rules and regulations covering the sale of liquor by wholesalers and importers". At about the same time Nathan Newman became the sales manager of International Import Company and Morris Newman became the purchasing agent.

Thereafter Malaby returned to San Francisco and vicinity and continued his previous activity of taking orders for wholesale lots of liquor and collecting cash for the over-ceiling charge. The orders were now taken on order forms furnished by the International Import Company, the orders were sent to the latter company and when whiskey was delivered on the order the company received the ceiling price therefor.

After a considerable part of the whiskey had been delivered it was condemned by the State of California and the complaints of purchasers brought to light the activities of the various parties.

## II.

### REASONS RELIED UPON FOR ISSUANCE OF WRIT.

Cain, petitioner herein, contends that he at no time was a party to any agreement to sell, or offer for sale, whiskey at over-ceiling prices; that he did not know the activities of Malaby, the Newmans and others of charging and collecting moneys in excess of ceiling prices, and that his sole connection and knowledge of the enterprise was that of selling whiskey on the orders furnished at ceiling prices.

**A. The indictment is duplicitous. It charges an agreement to violate Sections 904a-925 United States Code. This amounts to charging as many separate offenses in one count as there are sections within the included numbers that individuals could agree to violate.**

Selling and delivering a commodity at prices in excess of the established ceiling prices would be in violation of Section 904a U.S. Code. At the same time, offering to sell and deliver would be a violation of Section 925 U.S. Code. A violation of these separate sections would be distinct offenses. Hence, when such violations are charged in one count, such count is duplicitous and the accused is not informed by such count of what or which charge he is to meet at the trial and cannot prepare his defense.

The indictment charges two distinct activities, one, the selling and delivering and, two, the offering to sell and deliver. The first activity and only the first is inhibited by Section 904a. It is only accomplished sales and deliveries that violate this section. The activity of offering to sell and deliver is governed only

by Section 925a. Hence, two distinct offenses are charged in the one count of the indictment and the record including the judgment does not disclose which offense this petitioner was found guilty of and if the sentence is appropriate thereto.

**B. The indictment charged a conspiracy entered into prior to March 10, 1944 and did not charge any subsequent conspiring, agreeing or adhering. Since Cain did not know of the other accused or of their activities until subsequent to March 10, 1944, he could not have been a member of the conspiracy charged in the indictment.**

It is undisputed that Cain was not one of the original conspirators, that is—the alleged conspiracy was formed in the first instance by others of the accused before Cain knew them or knew of their activities. The indictment in the case charged that the accused,

> "* * * at a time and place to said Grand Jurors unknown, did unlawfully, wilfully, knowingly and feloniously conspire and agree together and with divers other persons to said Grand Jurors unknown, to commit offenses against the laws of the United States, to-wit, *offenses in violation of Title 50 United States Code, Appendix, Sections 904a-925, by wilfully selling and delivering and by wilfully offering to sell and deliver,* a certain commodity, to-wit, distilled spirits (whiskey), at prices over and in excess of the maximum prices duly established by the Price Administrator * * * and that *thereafter* and during the existence of said conspiracy and to effect the object thereof, one or more of said defendants as hereinafter mentioned by name, did at the times and places hereinafter set out, and within the jurisdiction of this Court, commit the following acts in fur-

therance of said conspiracy:" (P. R. 2-3.) (Emphasis added.)

The first overt act in point of time as alleged in the indictment reads:

> "1. On or about March 10, 1944, the defendants Nathan Newman, Charles Malaby, R. H. Shaffer and Walter O. Files met together at 309 Kearney Street, San Francisco, California;" (P. R. 3.)

Since the indictment alleges that the overt acts occurred after the accused, by the indictment, are alleged to have conspired and agreed, it must be taken as true that the conspiracy charged was entered into prior to the commission of the first overt act alleged in point of time, to-wit: March 10, 1944. Hence the indictment in effect alleges that the accused conspired and agreed on or before March 10, 1944, and thereafter did the overt acts. The reference to the overt acts alleged is the only thing contained in the indictment which fixes the consummation of the conspiracy charged as well as its accomplishment and ending.

Since the evidence without any question shows that Cain never met nor did he know of the existence or activities of the other accused until after the date fixed in the indictment as subsequent to the consummation of the conspiracy, he could not have been a member of the conspiracy charged.

**C. If the charge against Cain was that a conspiracy was formed by others of the accused and that Cain became a member of the conspiracy subsequent to the time fixed in the indictment as the time when the conspiracy was consummated, the indictment should have so alleged. Without such charge, Cain was not informed of the charge he was to meet at the trial and could not prepare his defense thereto.**

The prosecution contended at the trial that although Cain was not one of the original conspirators, that he became a member of the conspiracy after it was formed. Petitioner contends that if the charge is that the conspiracy was formed by others of the accused and that Cain thereafter became a member thereof, the indictment must so allege. Without such a charge Cain was not informed of any charge against him except as contained in the indictment, to-wit: that he conspired and agreed prior to March 10, 1944, and he was not prepared to defend himself against any charge except that contained in the indictment.

**D. The indictment fails to charge a conspiracy. At most it merely charges the doing of acts which, in themselves, are only misdemeanors.**

It is to be noted that the indictment charges that the accused conspired and agreed "by wilfully selling and delivering and by wilfully offering to sell and deliver". The conspiring and agreeing is limited by the manner in which it is alleged to have been done. Also this limitation denotes completed acts, a further reason why the indictment failed to inform Cain that the charge he was to meet was that of adhering to a conspiracy already formed. By alleging

the doing of acts as the method of agreeing, the agreement itself which is the gist of the offense, is only inferentially alleged, that is, from the allegation that the acts were done it is left to inference that there was a concerted agreement between the parties to do the acts. Each of the accused separately could sell, deliver, and offer to sell and deliver without any agreement among themselves. It does not necessarily follow that because some of the accused did the acts charged that there was an agreement between any or all of them to accomplish the end of selling and delivering whiskey at over-ceiling prices.

**E. The evidence was insufficient to show that Cain became a member of the conspiracy after it was formed.**

The only witnesses who gave any testimony as to Cain's connection with the other accused were Cardinelli and Malaby, the latter of whom pleaded guilty to the conspiracy as charged.

Cardinelli's testimony (P. R. 132-135) is insufficient to prove any connection of Cain with the conspiracy charged for two reasons. First, it is totally lacking in any statement from which it might be inferred that Cain had agreed with anyone to sell, or offer to sell, whiskey at "over-ceiling"prices. The mere fact that Cain was in a hotel room at the time others of the accused were there does not prove that Cain had become a member of the conspiracy. The effect of this evidence was that he took no part in the activities of the others at the time. Second, Cardinelli's meeting with Cain was in the month of May.

This was subsequent to the time of any overt act alleged and proved, and hence the conspiracy as charged was at an end. There is nothing in the indictment indicating that the conspiracy continued beyond the one overt act alleged and proved.

Malaby's testimony (P. R. 183-242) is also insufficient to prove Cain a member of the conspiracy for two reasons. First, at the most it goes no further than to show that Cain knew of the activities of the other accused, but fails to show he sold, or offered for sale, any whiskey at "over-ceiling" prices or agreed to do so. The fact that Cain knew of the activities of the others would not make him a party thereto. Second, Malaby was a conspirator and pleaded guilty to the charge. Hence, his testimony is not competent to prove that Cain was a member of the conspiracy without proof aliunde.

Aside from the testimony of the aforementioned witnesses, none of the other witnesses at the trial mentioned Cain in any way to connect him with the conspiracy. The other evidence was documentary and did not show Cain to have been a member of the conspiracy.

**F. The documentary evidence was entirely circumstantial and was insufficient to prove that Cain became a member of the conspiracy charged.**

The documentary evidence consisted of the letters and papers given to and signed by Malaby, being Government Exhibits 22 and 22A (P. R. 259) and Defendants' Exhibit D. (P. R. 216.) The documentary

evidence also included the orders for whiskey taken on the forms furnished by International Import Company at the ceiling prices and invoices at the same prices. These documents were described and received in evidence as follows:

| Exhibit No. | P.R. Page |
|---|---|
| 3 | 247 |
| 4 | 252 |
| 7, 7B | 253 |
| 8, 8A | 253-54 |
| 9, 9A | 254 |
| 10, 10A | 254 |
| 13, 13A | 256 |
| 18, 18A | 257-58 |
| 20A, 20B | 258 |
| 22, 22A | 259 |
| 23 | 259 |
| 25, 25A | 260 |
| 28 | 261 |
| 29 | 261 |

The letters and papers given to Malaby above referred to contain nothing in themselves incriminating and no evidence was given by the prosecution to the effect that such letters were not given in good faith and for any other or further purpose than the face thereof imports. Hence, they are evidence of Cain's innocence rather than guilt. The other documents consisting of orders, invoices and payments for whiskey at ceiling prices are not evidence of an agreement to sell whiskey at over-ceiling prices, but rather the reverse. Certainly, evidence of doing a legal act

is no evidence of the doing of an illegal act or an agreement to do so. Hence, we have no evidence that Cain was or ever became a member of a conspiracy to sell whiskey at over-ceiling prices or knew of such conspiracy except such as was given by Malaby, a conspirator, which evidence was incompetent for such purpose.

**G. Since Cain was not shown to have been a member of the conspiracy charged, the admission in evidence of statements and conversations of persons not in his presence and not before the Court as witnesses was the admission in evidence of hearsay and was error.**

We believe it has been demonstrated herein that Cain was not shown to have been a member of the conspiracy charged. Hence, evidence of conversations had not in the presence of Cain is hearsay evidence.

The objections and exceptions to the admission of this hearsay testimony is covered by assignments of error numbers VII to XVI. (P. R. 54-72.) Proper motions to strike this hearsay evidence were made at the close of the Government's case in chief (P. R. 262-267) and were denied by the trial Court (P. R. 267); these motions were renewed and again made at the close of the trial (P. R. 310-311) and such motions were denied. (P. R. 311.)

Wherefore, your petitioner prays that a writ of certiorari be issued out of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court for its review and

determination, at a date to be therein designated, a complete transcript of all of the proceedings in said United States Circuit Court of Appeals for the Ninth Circuit in said cause, entitled Nathan Newman, W. O. Files, R. H. Shaffer, and Burt Cain, appellants, v. United States of America, appellee, No. 10,990, in the records of said United States Circuit Court of Appeals and that the judgment decree of said United States Circuit Court of Appeals in said cause be reversed by this Honorable Court and that your petitioner have such other and further relief as to this Honorable Court may seem meet and the nature of the case require, and so your petitioner will ever pray.

Dated, San Francisco, California,
September 6, 1946.

SIMEON E. SHEFFEY,
*Attorney for Petitioner.*

## Certificate of Counsel

I hereby certify that I am the attorney for the petitioner in the above entitled case, and that in my judgment the foregoing petition is well founded in law and fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
September 6, 1946.

Simeon E. Sheffey,
*Attorney for Petitioner.*

# In the Supreme Court
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# United States

OCTOBER TERM, 1946

No.

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| BURT CAIN, | *Petitioner,* |
| vs. | |
| UNITED STATES OF AMERICA, | *Respondent.* |

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**
**to the United States Circuit Court of Appeals**
**For the Ninth Circuit.**

## I.

### OPINION OF THE COURT BELOW.

The opinion of the Court below is set forth in the printed record, pages 325-331.

## II.

### JURISDICTION.

The question of Federal Law believed to sustain jurisdiction of this petition is set forth in a jurisdictional statement filed herewith.

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## III.

### STATEMENT OF CASE.

Such statement is set forth in the petition filed herewith (pages 3-5) and, therefore, is not repeated here.

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## IV.

### SPECIFICATION OF ERRORS.

1. The trial Court erred in overruling the objection of this petitioner in particular to the sufficiency of the indictment. The rulings of the trial Court were assigned as such in Assignments of Error I to VI, inclusive (P. R. 51-54) and XVI. (P. R. 71.)

2. The trial Court erred in overruling the objections of this petitioner to the admission of evidence which was hearsay so far as this petitioner was concerned. The rulings of the trial Court were assigned as such in Assignments of Error VII to XV, inclusive. (P. R. 54-71.)

3. The trial Court erred in overruling this petitioner's motion for an acquittal at the close of the Government's case in chief and a like motion at the

close of the entire case. Exception was taken to the Court's rulings on said motions and assigned as error, the first being Assignment of Error II (P. R. 51), and the second being Assignment of Error XVI. (P. R. 71.)

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## V.

## ARGUMENT.

### 1. SUMMARY.

Summarizing the argument on behalf of the petitioner herein, it is contended that the indictment was too indefinite and uncertain to inform this petitioner of the charge he was to meet at the trial, that he was mislead thereby and did not and could not properly prepare his defense thereto. In the first place, the indictment was duplicitous in that it charged a conspiracy to violate Sections 904a-925 of the United States Code. The accused were entitled to know with particularity which section or sections they were charged with conspiring to violate. Secondly, the indictment charged the formation of only one conspiracy and, in effect, alleged that this conspiracy was consummated before a fixed date. This was the only conspiring or agreeing that was charged. Petitioner herein proved that he had never met nor heard of the other accused or of their activities until after the fixed date, and hence could not have been a member of the conspiracy as laid in the indictment. We are not unmindful of the fact that a person may be proved to have become a member of a conspiracy after it has been formed, but this is a matter of evi-

dence and such proof must be within the issues of the pleadings. What we are dealing with here is a matter of pleading. If joining a conspiracy after it has been formed is not within the issues of the pleadings, then proof thereof cannot be had. We contend that the accused is entitled to be informed by the indictment when and how he became a member of the conspiracy charged, that if it is not contended that he was one of the original conspirators but that he adhered to it after it was formed, the indictment should so inform him; and that without such information he can not properly prepare his defense. That petitioner believed and was entitled to believe that when he met and disproved that he was a party to the conspiracy, as laid in the indictment, he was entitled to an acquittal.

The indictment alleges that the accused "conspired and agreed", but it alleges that they conspired and agreed "by wilfully selling and delivering and by wilfully offering to sell and deliver". The manner of the conspiring and agreeing is limited and qualified by the method in which it is alleged to have been done. The fact that the accused wilfully did the acts of selling etc. does not denote a concerted agreement to do the acts. Finally, the Government's case was largely based on evidence that was hearsay as to this petitioner. The effect of this evidence should have been limited to those who were admittedly conspirators or were shown to be so by competent evidence. This petitioner was prejudiced by the erroneous admission of such evidence and could not have been convicted without it.

**2. THE INDICTMENT IS DUPLICITOUS. IT CHARGES AN AGREEMENT TO VIOLATE SECTIONS 904a-925 UNITED STATES CODE. THIS AMOUNTS TO CHARGING AS MANY SEPARATE OFFENSES IN ONE COUNT AS THERE ARE SECTIONS WITHIN THE INCLUDED NUMBERS THAT INDIVIDUALS COULD AGREE TO VIOLATE.**

Since the indictment charges a conspiracy to violate Sections 904a-925 of the United States Code, it charges a conspiracy to violate each section of such code within the included numbers that it is possible for individuals to agree to violate. It is within the realm of possibilities for persons to agree to violate each and all of the sections within the included numbers. Possibly the framer of the indictment, sensing this possibility, sought to limit its scope by alleging that the conspiring and agreeing was done or accomplished "by wilfully selling and delivering and by wilfully offering to sell and deliver". This limitation, however, does not eliminate the duplicity and uncertainty from the indictment. It is only accomplished sales and deliveries that are inhibited by Section 904a. One could offer to sell and deliver indefinitely but without making sales and/or deliveries would not be in violation of Section 904a. The activity of offering to sell and deliver would come under the provisions of Section 925a and the procedure of such section. Hence, the indictment in the one count charges a conspiracy to commit at least two distinct offenses. It cannot be doubted that the indictment charges two distinct activities since the first activity charged is the accomplished sales and deliveries and the second charged is that of offering to sell and deliver.

In *Evans v. United States* (153 U.S. 584), 38 L. Ed. 830, 831, the Court said:

> "A rule of criminal pleading, which at one time obtained in some of the circuits, and perhaps received a qualified sanction from this court in *United States v. Mills,* 32 U.S. 7 Pet. 138, that an indictment for a statutory misdemeanor is sufficient, if the offense be charged in the words of the statute, must, under more recent decisions, be limited to cases where the words of the statute themselves, as was said by this court in *United States v. Carll,* 105 U.S. 611, 'fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished'. The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. *United States v. Cook,* 84 U.S. 17 Wall. 174; *United States v. Cruikshank,* 92 U.S. 542, 558. 'The fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent'. *United States v. Carll,* 105 U.S. 611."

Duplicity and uncertainty in pleading was condemned by the Court in *Bratton v. United States,* 73 Fed. (2d) 795, 797, saying:

> "If the indictment leaves the defendant in fair doubt as to the offense charged, it fails to meet the test that an indictment should 'leave no doubt in the minds of the accused and the court of the

exact offense intended to be charged.'" (Citing authorities.)

To the same effect as the foregoing cases are *Creel v. United States,* 21 Fed. (2d) 690; *United States v. Cleveland,* 281 Fed. 249.

It requires no extended citation of authority to establish this rule. We believe we have demonstrated that the indictment involved herein is in violation thereof.

**3. THE EVIDENCE IN THIS MATTER CONCLUSIVELY SHOWS THAT BURT CAIN WAS NOT A MEMBER OF THE CONSPIRACY CHARGED IN THE INDICTMENT.**

**(a) The indictment charges the formation of only one conspiracy and that prior to March 10, 1944.**

The indictment in the case at bar charges that the accused,

> "* * * at a time and place to said Grand Jurors unknown, did unlawfully, wilfully, knowingly and feloniously conspire and agree together and with divers other persons to said Grand Jurors unknown, to commit offenses against the laws of the United States, * * * and that *thereafter* and during the existence of said conspiracy and to effect the object thereof, one or more of said defendants as hereinafter mentioned by name, did at the times and places hereinafter set out, and within the jurisdiction of this Court, commit the following acts in furtherance of said conspiracy:" (P. R. 2-3.) (Emphasis added.)

The first overt act in point of time as alleged in the indictment, reads:

"1. On or about March 10, 1944, the defendants Nathan Newman, Charles Malaby, R. H. Shaffer and Walter O. Files met together at 309 Kearny Street, San Francisco, California;" (P. R. 3.)

Since the indictment alleges that the overt acts occurred after the accused, by the indictment, are alleged to have conspired and agreed, it must be taken as true that the conspiracy charged was entered into prior to the commission of the first overt act in point of time, to-wit: March 10, 1944. Hence the indictment in effect alleges that the accused conspired and agreed on or before March 10, 1944 and *thereafter* did the overt acts.

We realize that it may be proved that a person may become a part of a conspiracy after it has been formed, but this proof must come within the terms of the indictment and if such is the contention, the indictment should so charge, or the overt acts alleged should so demonstrate. The indictment here involved, after alleging in effect the consummation of the plan or scheme prior to March 10, 1944, then alleges the commission of nine overt acts, in none of which was Cain a participant. Since the evidence shows conclusively that Cain did not know, or had not met any of the other accused, until after March 10, 1944, he could not have been a party to the formation of the original conspiracy charged. Unless, therefore, Cain is accused by the indictment of becoming a member of the conspiracy subsequent to its formation or with the doing of some overt act alleged bringing him into

the conspiracy, there is no charge against him except that he conspired and agreed prior to March 10, 1944. He is and was at the trial totally uninformed by the indictment of any other charge which he was to meet.

In *Terry v. U.S.*, 7 Fed. (2d) 28, 29, the Court says:

> "Ordinarily a charge of conspiracy is not circumscribed or limited by averments as to the time when or the place where the conspiracy was formed. *The charge is limited, however, by the terms of the indictment itself. The indictment here charges but one combination or conspiracy, however divers its objects, and no defendant could be convicted thereunder unless he was shown to be a member of or party to that conspiracy.* Furthermore, the scope of the conspiracy must be gathered from the testimony, and not from the averments of the indictment. *The latter may limit the scope but cannot extend it.*" (Emphasis added.)

In the case at bar, only one conspiracy is charged by the indictment. That conspiracy as to its formation is limited as to time by the allegations of the indictment of the first overt act to some time prior to March 10, 1944. This is the only conspiracy or agreement charged.

**(b) The evidence without any question shows that Cain never met nor did he know of the existence of the other accused until after the date fixed in the indictment as subsequent to the consummation of the conspiracy charged, and hence could not have been a member thereof.**

The only evidence showing any association of appellant Cain with any of the parties at any time is that of the witnesses Malaby, Cardinelli, and of Cain himself.

Fixing the time of his first meeting with Cain, Malaby testified:

> "The day that I met Cain we did not talk very much, but the next day I came back and we talked about the transaction, and I told Cain that I wished he would give two letters of credentials, to show people that I was representing International Import Company; and he gave me those letters, and they are marked Government's Exhibits 22 and 22-A for Identification, and are dated March 22, the date I received them." (P. R. 192.)

Cardinelli fixed the time of his meeting Cain as follows:

> "Some time in May I came to San Francisco and went to the Palace Hotel where Malaby was. I talked very little to Cain. I said, 'How do you do' when I was introduced." (P. R. 135.)

Cain, himself a witness, testified:

> "I first met the Newmans, Nathan and Morrie, about the middle of March, 1944; and Malaby about March 21, 1944." (P. R. 271.)

This is the only evidence fixing the time Cain first met any of the accused and is undisputed. There was no showing that Cain ever met any of the other accused.

In a conspiracy indictment it is not necessary that the exact date of the formation of the conspiracy be alleged. However it is necessary that the time of the formation be alleged and proved to be prior to the doing of the overt acts. This rule the indictment in the case at bar recognizes by fixing the dates of the overt acts and by alleging that they were done after the formation of the conspiracy.

> *Bradford v. United States,* 152 Fed. 616, 619.
>
> "This is not a case where the date of the formation or the beginning of the conspiracy must be plead with exact accuracy. It need not be proven that the conspiracy was formed and begun at the date given in the indictment. *The essential point is that the conspiracy existed before the date of the overt act alleged, and continued to exist at the time the overt act was committed.*" (Emphasis added.)

What must be proven must be alleged, hence the allegation, in the indictment at bar, that the conspiracy was formed before the overt acts were done, fixes the time. That the overt acts may be referred to for fixing time, see *Fisher v. United States,* 2 Fed. (2d) 843, 845.

It is no answer to this contention to say that a conspiracy as to time need not be proved exactly as charged in the indictment or that a conspiracy is suffi-

ciently proved if it is shown to have been in existence prior to the time of the commission of any overt act alleged and proved. Such answer relates to evidence, while the matter we are dealing with here is a matter of pleading. The question is if an indictment, charging a conspiracy on or before a fixed date, informs the accused that the charge against which he will be called upon to defend is that of adhering to the conspiracy at a time subsequent to the fixed date. Cain was entitled to rely upon the indictment as containing the sum total of the charge he was to meet. As said by the Court in *Harris v. United States,* 104 Fed. (2d) 41, 45:

> "The basic principle of American jurisprudence is that no man shall be deprived of life, liberty, or property without due process of law. In a criminal proceeding, the indictment must be free from ambiguity on its face; the language must be such that it will leave no doubt in the minds of the court or defendant of the exact offense which the latter is charged with. It should leave no question in the mind of the court that it charges the commission of a public offense."

In the indictment in the case at bar, Cain was not only left in doubt, he was entirely uninformed of the charge he was to meet.

In *White v. United States,* 67 Fed. (2d) 71, the accused was charged with concealing assets in a bankruptcy matter. The assets were described as "personal property * * * of the total value of Seventeen Thousand Dollars ($17,000), a more particular description

thereof being to the Grand Jurors unknown." The opinion of the Court contains an extended review of the authorities and concludes (page 79):

> "In dealing with laws which are intended equally for the protection of the innocent as well as the punishment of the guilty, too much latitude should not be indulged solely for the purpose of arriving at a desired result in an individual case. The looseness in criminal pleading brought to light in this case should not receive encouragement through judicial sanction."

In *Jarl v. United States,* 19 Fed. (2d) 891, the indictment in the first count charged the unlawful transportation of intoxicating liquor, and the second count charged the unlawful selling thereof. The first count did not specify the points between which the transportation was made, nor the manner thereof. The second count did not name the place of sale, the purchaser, nor the price. The Court held the indictment bad, saying (page 894):

> "It is contended that if the first and second counts were not good the defendants had it within their power to cure the defect by requesting a bill of particulars; but that is no remedy for material and substantive omissions from the charge. Whether a bill of particulars shall be furnished in any case, civil or criminal, is within the discretion of the trial court; and grant that the exercise of that discretion is subject to appellate review, it must be obvious that procedure would not afford a defendant the protection vouchsafed to him. In Harrington v. Harrington, 107 Mass. 329, 334, the court, addressing itself to this subject, said:

'The other exceptions taken at the trial cannot be sustained. The refusal of the court to order further specifications is not the subject of exceptions. In all cases, civil and criminal, the question whether bills of particulars or specifications shall be ordered is within the discretion of the presiding judge. Commonwealth v. Giles, 1 Gray (Mass.) 466; Commonwealth v. Wood, 4 Gray (Mass.) 11; Gardner v. Gardner, 2 Gray (Mass.) 434.'

A charge may be good and yet it may be made to appear that in fairness the defendant should be furnished with additional information to prevent surprise, restrict the proof and thus enable him to make reasonable preparation for his defense. It cannot be used to cure an indictment fatally defective."

In *Berger v. United States* (295 U.S. 78), 79 L. Ed. 1314, 1318, the Court said:

"The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense."

It is unnecessary to multiply the citation of cases dealing with situations analogous to petitioner's herein. It seems too clear to require further argument to show that where the indictment charges the consummation of a conspiracy before a fixed date, charges

that Cain was a member of such conspiracy before such date and Cain meets this charge and disproves it, that he should then be confronted with the charge that he adhered to and became a member of the conspiracy after the fixed date and found guilty thereof under an indictment that informs him that he is charged only with conspiracy before the said date.

A person cannot be convicted on *the* overt act who has not joined in the previous conspiracy.

*United States v. Hirsch* (100 U.S. 33), 25 L. Ed. 539, 540.

As said by the Court in *Terry v. United States,* supra, page 30:

> "* * * a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime."

Without an allegation in the indictment that Cain became a member of the conspiracy subsequent to the time of its formation and without some allegation as to how he did so or without a recital therein of an overt act which fixed Cain as a participant in said conspiracy, the indictment at most merely charged that Cain conspired with the other defendants, on or before March 10, 1944. The evidence refutes this charge. However, it was the only charge which the indictment informed Cain that he was to meet at the trial and against which he was called upon to defend himself.

Since the gist of a conspiracy is the conspiracy itself, the overt acts alleged must post-date the forma-

tion of the plan or scheme, or, if the conspiracy is a continuing one, it must be alleged or shown in the indictment when and how the particular accused became subsequently a member of the conspiracy.

As to the relation in time of the charge of conspiracy and the doing of overt acts, the Court said, in *United States v. Miller,* 36 Fed. 890, 892:

> "In neither count is there any averment of time or place of the alleged 'overt' act, which would seem to be necessary to identify the act, and to show the court and jury that the same post-dated the conspiracy, and was in fact an act, not a part of the conspiracy but done to effect its object."

To the same effect is *United States v. Richards,* 149 Fed. 443, 452, where the Court, in charging the jury, said:

> "I have before stated that the overt act must be one independent of the conspiracy or agreement. This is true. Yet the overt act, the manner and the circumstances under which it is done, may be considered, in connection with other evidence in the case, as one circumstance in determining whether or not there was the conspiracy or agreement charged. *But it must be established that the conspiracy or agreement which is charged to have existed, and which is the gist of the action in this case, had been formed before and was existing at the time of committing the overt act."* (Emphasis added.)

*Dahly v. United States,* 50 Fed. (2d) 37, 42:

"A conspiracy under Section 37 Cr. Code (18 U.S.C.A. §§88) is an agreement by two or more persons to commit an offense against the United States. The gist of the offense is the conspiracy; that is, the agreement between two or more persons to effect the unlawful end; but before the offense is a completed one, some one or more of the parties to the conspiracy must do some act to effect the object of the conspiracy. Such act is called an overt act.

"Two things, therefore, must be proved before a conviction can properly be had: (1) The conspiracy or agreement to commit the offense named against the United States; (2) an overt act or acts done in furtherance of the conspiracy. The overt act or acts need not be criminal per se; but an overt act must be one independent of the conspiracy or agreement. It must not be one of a series of acts constituting the agreement or conspiracy together, *but it must be a subsequent independent act following the complete agreement or conspiracy, and done to carry into effect the object of the conspiracy.*

"The overt act or acts, the manner and circumstances under which they are done, may be considered in connection with other evidence in the case as circumstances in determining whether or not there was formed the conspiracy or agreement charged; *but it must be established that the conspiracy or agreement which is charged to have existed and which is the gist of the offense had been formed before and was existing at the time of the commission of the overt act or acts.*" (Emphasis added.)

Aside from the allegation contained in the indictment to that effect, Cain was warranted in his belief that the indictment charged him only with conspiring and agreeing before the date fixed, by the rule of law that requires the overt acts to post-date the conspiracy. This is another circumstance that goes to show how misleading the indictment was in this case and how Cain was prejudiced thereby in the preparation of his defense.

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4. **IF THE CHARGE IS THAT THE CONSPIRACY WAS FORMED BY OTHERS OF THE ACCUSED AND THAT CAIN THEREAFTER BECAME A MEMBER THEREOF, THE INDICTMENT SHOULD SO ALLEGE. CAIN WAS NOT INFORMED OF ANY CHARGE AGAINST HIM EXCEPT AS CONTAINED IN THE INDICTMENT AND COULD NOT PREPARE HIS DEFENSE EXCEPT AS CHARGED.**

Cain at the trial was prepared to meet, did meet and disprove that he was a member of, or entered into any agreement of, conspiracy prior to March 10, 1944, as laid in the indictment. He was not charged with participating in or with having any knowledge of the overt acts alleged, and the evidence did not prove any such connection. At the trial of the matter it was contended by the prosecution that Cain, after the conspiracy had been formed and subsequent to March 10, 1944, had adhered to and by agreement and acts, had become a member of, the conspiracy. This the indictment does not charge and without such charge Cain was not informed of the charge he was to meet. Under these circumstances, Cain, knowing full well that he could disprove his entry into any conspiracy

as laid in the indictment, waived his right to trial by jury. Furthermore, a judgment of conviction or acquittal of a conspiracy formed prior to March 10, 1944, could not be pleaded in bar of a charge of conspiracy formed subsequent to such date. We, of course, know the rule that one may join a conspiracy after it is formed, and in so doing his act of joining relates back to the inception of the conspiracy, but this is a matter of evidence. *What we are dealing with here is a matter of pleading.* In order for the evidence to be admissible, it must be appropriate to the pleading. The pleading limits the scope of the evidence admissible and not vice versa. To make evidence admissible that Cain become a member of the conspiracy after it was formed, the indictment must so allege. Without such allegation, Cain was entirely uninformed of the charge he was called upon at the trial to meet. When Cain met and disproved that he had conspired prior to March 10, 1944, he had met and disproved every charge against him contained in the indictment. In *United States v. Green,* 136 Fed. 618, 656, the Court said:

> "In a criminal indictment charging a conspiracy to defraud the United States, the defendants are entitled to be informed in the indictment of the acts they are charged with having agreed to do, by which the fraud is to be perpetrated or consummated. Pettibone v. United States, 148 U.S. 197-202, 13 Supt. Ct. 542, 37 L. Ed. 419; United States v. Hess, 124 U.S. 483-486, 8 Sup. Ct. 571, 31 L. Ed. 516; United States v. Britton, 108 U.S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698. *The defendants in such an indictment, aside from meeting the*

> *overt acts, are required to be prepared to defend themselves against proof that they agreed to do the acts charged as having been agreed to be done. They are not to be called upon—they are not required to be prepared—to show that they did not make or enter into an agreement, the terms of which are not fairly stated or set forth in the indictment.* It is not sufficient to charge the crime in the words of the statute, or to state an agreement to do acts which, if done, would not operate to defraud the United States. United States v. Cruickshank et al., 92 U.S. 558, 559, 23 L. Ed. 588, and cases there cited." (Emphasis added.)

If it was the contention that Cain became a member of the conspiracy after it was formed, such charge, if made in the indictment, would have informed him of what he was to meet.

The Court said in *United States v. Atlanta Journal Co.*, 185 Fed. 656, 662:

> "These are the only instances under the acts of Congress in which a publication having the other requisites and admitted to the second class would violate the law by mailing under the second-class rate. *In a case like this, charging a crime under section 5440 of the Revised Statutes (page 3676, U. S. Comp. St. 1901), it should not be necessary to gather the case from mere inference, but it should charge with reasonable certainty that which would constitute an offense under the law.* Many authorities might be cited in support of this." (Emphasis added.)

Likewise the rule is announced in *Smith v. United States*, 157 Fed. 721, 725:

> "A fundamental and well-established rule necessary to be observed in all cases is that all the essential elements of the offense must be averred in the indictment, and that, too, with sufficient clearness and particularity to enable the accused to understand the nature of the charge against him, to intelligently prepare to meet it, and to plead the result, whether conviction or acquittal, as his protection against another prosecution for the same offense."

In the case at bar the government must have known the time when it was contended that Cain became a member of the conspiracy charged and the manner thereof. The indictment could have been framed so as to have informed Cain of its contention and not in a manner that led him to believe he was charged with conspiring before a fixed date. In this connection, we cite the case and quote from the opinion of *United States v. Cruikshank* (92 U.S. 542), 23 L. Ed. 588, 593:

> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In U.S. v. Mills, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;" and in U.S. v. Cook, 17 Wall. 174, 21 L. Ed. 539, that 'Every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense,

whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars.' 1 Arch. Cr. Pr. and Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause, and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

In *Fontana v. United States,* 262 Fed. 283, 286, the Court said:

"The basic principle of English and American jurisprudence is that no man shall be deprived of life, liberty, or property without due process of law; and notice of the charge or claim against him, not only sufficient to inform him that there is a charge or claim, but so distinct and specific as clearly to advise him what he has to meet, and to give him a fair and reasonable opportunity to prepare his defense, is an indispensable element of that process. When one is indicted for a serious offense, the presumption is that he is innocent thereof, and consequently that he is ignorant of the facts on which the pleader founds his

charges, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him in the pleading. Miller v. United States, 133 Fed. 337, 341, 66 C.C.A. 399, 403; Naftzger v. United States, 200 Fed. 494, 502, 118 C.C.A. 598, 604.

It is essential to the sufficiency of an indictment that it set forth the facts which the pleader claims constitute the alleged transgression, so distinctly as to advise the accused of the charge which he has to meet, and to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense, and so clearly that the court may be able to determine whether or not the facts there stated are sufficient to support a conviction."

In the case at bar the indictment gives no particulars whatsoever except that the accused conspired and agreed prior to March 10, 1944, and did the overt acts alleged, in none of which was Cain a participant or shown to have had any knowledge of. Without such particulars as the foregoing authorities indicate as necessary to an indictment, we believe the only charge in the present indictment against Cain was that he conspired and agreed prior to the said date, and this charge he completely disproved.

This fundamental rule of law requires no further citation of authority to establish it. The indictment charging that Cain conspired and agreed prior to

March 10, 1944, did not inform him that he was to meet a charge of conspiring or adhering to a previously formed conspiracy subsequent to this date. He is entitled to stand upon the indictment as to when and how he is charged to have become a member of the conspiracy.

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**5. THE INDICTMENT FAILS TO CHARGE A CONSPIRACY. AT MOST IT MERELY CHARGES THE DOING OF ACTS WHICH, IN THEMSELVES, ARE ONLY MISDEMEANORS.**

The indictment charges that the accused conspired "by wilfully selling and delivering and by wilfully offering to sell and deliver". The conspiring and agreeing is limited by the manner in which it is alleged to have been done. This amounts merely to an allegation that the accused did the acts of selling and delivering. This leaves only to inference that there was a concerted agreement among the accused to do the acts charged. Each of the accused, individually, could wilfully do the acts charged without a concerted agreement among them to do so.

The point involved here is: Does the indictment charge a *conspiracy* to commit a violation of 50 United States Code, Appendix, or a *joint commission* of the substantive offenses denounced by 50 United States Code, Appendix?

We contend that the indictment *must* be construed as charging (except for the defects hereinafter pointed out), a *joint commission of the substantive offenses* rather than charging a *conspiracy* to violate the named sections of 50 United States Code, Appendix.

For the purpose of argument (only) we will concede that the wilful selling and delivering or the wilful offering to sell and deliver whiskey in violation of the regulations is a substantive offense. The prosecution must concede that "by wilfully selling and delivering and by wilfully offering to sell and deliver" that commodity in violation of the regulations, the defendants committed the *substantive* offense. ***That is the charge made here.***

The inclusion in this indictment of the section numbers of the statutes, which it is claimed the defendants conspired to violate, "form no part of the indictment, and neither add to nor take from the legal effect of the charge." (*U.S. v. Nixon,* 235 U.S. 231, 235.) Again this is borne out in *Taylor v. United States,* 2 Fed. (2d) 444, 446 (C.C.A. 7), in which it is said:

> "The indictment is a pleading. Its sufficiency must be determined by the facts therein set forth. For the pleader to insert his conclusion that such facts are in violation of section 135 of the Criminal Code or of section 1014 of the Revised Statutes of the United States (Comp. St. Section 1674) neither adds to nor detracts from the allegations which alone must measure the sufficiency of such pleading."

In *Biskind v. United States,* 281 Fed. 47 (C.C.A. 6), this language is used:

> "The sole question presented relates to the legal sufficiency of the indictment and proofs. The indictment charges a conspiracy to commit 'an offense against the United States; that is to say,

to violate section 143 of the United States Criminal Code (section 10313) by rescuing and setting at liberty a person convicted of an offense and ordered committed, etc. We agree with the contention that section 143 does not apply to the facts set out in the indictment, because that section punishes only a forcible rescue, which the stated facts negative. In our opinion, however, the misreference to that section does not invalidate the indictment. It is well settled that a reference to the section relied upon by the pleader, contained in either the caption or the margin of an indictment, does not limit the prosecution to proof of a case under such statute. Williams v. United States, 168 U.S. 382, 389, 18 Sup. Ct. 92, 42 L. Ed. 509; United States v. Nixon, 235 U.S. 231, 235, 35 Sup. Ct. 49, 59 L. Ed. 207. In those cases it was said that the caption or margin constitutes no part of the indictment, and neither adds to nor weakens the legal force of its averments, while in the instant case the reference to the statute is in the body of the indictment; but in our opinion the case before us is within the reason of the rule announced in the Williams and Nixon cases."

See also *Johnson v. Biddle,* 12 Fed. (2d) 366-369, and numerous cases cited therein, and *Martin v. United States,* 99 Fed. (2d) 236, 238 (C.C.A. 10), and *Moore v. Hudaneth,* 110 Fed. (2d) 386, 388 (C.C.A. 10).

Eliminating from the body of this indictment these code references, the charge reads that the defendants conspired——

"* * * to commit offenses against the laws of the United States, * * * by wilfully selling and

> delivering, and by wilfully offering to sell and deliver, a certain commodity, * * * (whiskey), at prices over and in excess of the maximum prices duly established by the Price Administrator by regulations and orders, * * *"

It will be noted that the defendants are charged with a conspiracy to commit an offense against the laws of the United States merely "by wilfully selling and delivering," etc., whiskey in violation of certain regulations; in other words, they are charged with a conspiracy by reason of the fact that they *did* wilfully sell and deliver that commodity in violation of the regulations. Such a charge is not enough. There must be a charge not only that the conspiracy was wilfully formed, *but that it was intended under the conspiracy* to violate the law by wilfully selling or delivering or by wilfully offering to sell or deliver, the whiskey in violation of the regulations. The doing of the act itself is not a conspiracy. The authorities for this proposition are clear.

You can have no conspiracy unless there is an intent to form a conspiracy; in other words, there must be a wilful participation in the conspiracy before any defendant could be held under such a charge. That is "Hornbook law." There can be no violation of Section 904 unless *that* violation is wilful. We quote from Section 925(b):

> "Any person who *wilfully* violates any provision of section 4 of this Act (section 904 of this Appendix) * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000.00

> * * * or to imprisonment * * * for not more than one year * * * or to both such fine and imprisonment."

It is a well established rule that the crime of *conspiracy* to commit a crime may be complete without the actual commission of the substantive offense to commit which the conspiracy was formed. The crime of conspiracy is committed when the unlawful federation and agreement occurs and one overt act in furtherance thereof is consummated. The overt act need not be in itself criminal at all, much less need it be the substantive offense itself. The commission of other overt acts does not enlarge the crime of criminal conspiracy.

Surely, it will be conceded that when the *object* of the conspiracy has been achieved, the conspiracy to achieve that object is at an end; that particular crime of conspiracy is finished.

> *Logan v. U.S.*, 144 U.S. 263, 12 S. Ct. 617, 36 L. Ed. 429;
> *Heard v. U.S.*, 255 Fed. 829 (C.C.A. 8);
> *Leady v. U.S.*, 280 Fed. 864 (C.C.A. 8).

See also:

> *Mitchell v. U.S.*, 118 Fed. (2d) 653 (C.C.A. 10);
> *Stapp v. U.S.*, 120 Fed. (2d) 898 (C.C.A. 5).

In the instant case there is no charge—nor can this one be construed as charging—the conspiracy as embracing any intention to sell and deliver or to offer to sell and deliver, etc.; the charge is that the defendants formed the conspiracy *by* selling and delivering

and *by* offering to sell and deliver. There is no charge of any continuing conspiracy. When the selling and delivering or the offering to sell and deliver occurred, the substantive offense (a misdemeanor) was actually committed; *it could not be a conspiracy to commit, but a joint participation in the commission of the substantive offense.*

On the other hand, "by wilfully selling and delivering and by wilfully offering to sell and deliver," etc., the substantive offense was committed and the overt acts set out in the indictment became meaningless and of no further force as to any defendant.

No new conspiracy was formed and no new offense was committed.

One of the vices—although not by any means the only vice—of this kind of pleading is the obvious attempt on the part of the prosecuting officials to convert a misdemeanor into a felony, by the simple expedient of charging a conspiracy punishable by a fine of not more than $10,000, or imprisonment of not more than two years, or both (18 U.S.C., Section 88), whereas the only crime committed here—if one was committed—was a misdemeanor through the violation of a regulation promulgated under Section 902(a), which violation under Section 925(b) is punishable by a fine of not more than $5,000.00 or imprisonment of not more than one year, or both. This practice has been condemned in no uncertain terms.

We quote from *United States v. Kissel, et al.* (C.C.A., N.Y.), 218 U.S. 601, 173 Fed. 823, and which

case has been favorably cited in *Heike v. United States,* 227 U.S. 131, 57 L. Ed. 450, 455:

> "There seems to be an increasing tendency in recent years for public prosecutors to indict for conspiracies when crimes have been committed. A conspiracy to commit a crime may be a sufficiently serious offense to be properly punished; but, when a crime has been actually committed by two or more persons, there is usually no proper reason why they should be indicted for the agreement to commit the crime, instead of for the crime itself. A large class of federal prosecutions * * * now habitually take the form of indictments for conspiracies to commit crimes, the actual commission of which is also usually alleged in the indictment. *Prosecutors seem to think that by this practice all statutes of limitations and many of the rules of evidence established for the protection of persons charged with crime can be disregarded.* But there is no mysterious potency in the word 'conspiracy'. *If a conspiracy to commit a crime has been carried out, and the crime committed, the crime, in my opinion, cannot be made something else by being called a conspiracy.* The men who have committed the crime are liable to whatever penalties the law imposes and to whatever protection the law affords. If the statute of limitations is a bar to a prosecution for the crime, that bar, in my opinion, cannot be lifted by a prosecution for a conspiracy to commit that crime." (Emphasis added.)

The following forceful language is from the opinion in *United States v. Eisenminger,* 16 Fed. (2d) 816, 821:

"I think that the rules of pleading in conspiracy cases should not be further relaxed to the prejudice of those accused, regardless of their guilt. It has in fact been long considered that there is in this country a tendency to extend the doctrine of conspiracy and utilize it for the indictment of persons suspected of crime of which there is difficulty of obtaining sufficient proof. Bouv. Dict. 'Conspiracy'."

In January of 1903, F. P. Blair, Esq., said in 37 Am. Law Rev. 33, under the title 'The Judge-Made Law of Conspiracy', that 'it has become in recent years quite the fashion in this country, where two or more are suspected of some crime, for public prosecutors to have them indicted for conspiracy. The courts have made it delightfully easy to secure a conviction by relaxing the rules of pleading and enlarging the scope of testimony. Thus a great mass of decisions has accumulated, each court apparently vying with all the others to make new law, until now almost any sort of an agreement may be styled a conspiracy; any indictment containing the magic words 'combined and conspired subtlely and craftily' makes a good indictment, and any * * * evidence will prove the crime * * *.'

So widely has been the extension of the doctrine since those words were written that at the Judicial Conference held in 1925 under the Act of September 14, 1922 (42 Stat. 837), the Chief Justice of the United States and the Senior Circuit Judges made, in their Recommendations to the District Judges, this statement:

'We note the prevalent use of conspiracy indictments for converting a joint misdemeanor

into a felony, and we express our conviction that, both for this purpose and for the purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused.

'Although in a particular case there may be no preconcert of plan, excepting that necessarily inherent in mere joint action, it is difficult to exclude that situation from the established definitions of conspiracy; *yet the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for co-operative law breaking.* We observe so many conspiracy prosecutions which do not have this substantial base that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly. Further the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant'." (Emphasis added.)

These last quoted passages are used with strong approval, by Mr. Justice Butler, of the Supreme Court, sitting as a Circuit Justice, in *United States v. Motlow,* 10 Fed. (2d) 657, 662.

In our opinion, therefore, this indictment cannot be held to charge a conspiracy; its nearest approach to charging *any* crime is to charging a joint commission of a substantive offense under Section 925(a).

**6. THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT CAIN BECAME A MEMBER OF THE CONSPIRACY AFTER IT WAS FORMED.**

The only witnesses whose testimony in any way connected Cain with the activities of the other accused was that of Cardinelli (P.R. 132-135) and Malaby, a confessed conspirator. (P.R. 182-242.) Cardinelli testified that he went to the Palace Hotel in San Francisco in the month of May, 1944, and to a room in which were Malaby, Nathan Newman and Cain; that he was introduced to Cain, did not talk much to him, but exchanged friendly greetings; that Malaby and Newman were making out invoices for whiskey, that Cain was lying on a bed about eight feet away, that Newman asked Malaby about "the overage" and Malaby replied that he had gotten it. There is nothing to show that Cain heard this remark, that he knew what it meant or in any way assented to or approved it. Certainly it is not sufficient to prove that he was a member of a conspiracy to sell whiskey at overceiling prices. Even if he heard the remark and knew the significance attached to it by the prosecution, it would go no fruther than to show knowledge on Cain's part but would not show participation. The fact that Cain was taking no part in the activities then proceeding would rather indicate that he was not a participant therein. On the other hand, Cain testified (P.R. 275) that he had never met Cardinelli, hence could not have heard the statements of Malaby and Newman. Without a showing that Cain heard the statements of Malaby and Newman, Cain's statements that he did not must be taken as

true. If the statements attributed by Cardinelli to Malaby and Newman, conspirators, were not made in Cain's hearing, evidence thereof would be inadmissible to show Cain a member of the conspiracy under the rule laid down in *Glasser v. United States,* 315 U.S. 60, 89 L. Ed. 680, 701.

Malaby testified (P.R. 189-190) as to the Williams transaction and the Goldstein transaction and stated that up to that time Cain was not "in the agreement or picture". (P.R. 191.) When asked if Cain knew about the transactions, he stated in the form of a conclusion that "he was familiar with it". He testified (P.R. 194) that he told Cain that he, Malaby, was getting $55 to $57 a case and maybe could get $60, that Cain said that was fine but to be careful. He testified (P.R. 200) that, "I used to go down there every couple of weeks in connection with the operations we were in, and to visit. On those occasions I talked with Cain about the business; and on different occasions we discussed the different amounts of overage that had been collected."

Aside from some testimony about the meeting with Cardinelli, Malaby's further testimony does not connect Cain with the activities of the conspiracy. The most that can be said for Malaby's testimony is that Cain knew of the activities of the conspiracy, but it does not show that he had become a party thereto. But this is insufficient to prove that Cain became a conspirator. *Thomas v. United States,* 57 Fed. (2d) 1039, 1042. This Court said:

"Mere knowledge or approval of or acquiescence in the object and purpose of a conspiracy without agreement to cooperate to accomplish such object or purpose is not enough to constitute one a party to the conspiracy. Lucadamo v. United States (C.C.A. 2), 280 F. 653, 657; Marrash v. United States (C.C.A. 2), 168 F. 225; Turcott v. United States (C.C.A. 7), 21 F. (2d) 829; United States v. Lancaster (C.C.Ga.), 44 F. 896, 10 L.R.A. 333".

It is to be borne in mind that the charge contained in the indictment in the case at bar is not that of selling whiskey, but that of selling whiskey at overceiling prices. The latter is the thing that Cain must be shown to have done.

The documentary evidence is sufficiently referred to on pages 11-13 of the petition herein, and will not be repeated. The letters and invoices are nothing more than such as would be used in the sale of whiskey at ceiling prices. All of this evidence is as consistent with innocence as with guilt, hence it is insufficient to sustain a conviction of guilt.

*United States v. Holt,* 108 Fed. (2d) 365, 368;
*Langer v. United States,* 76 Fed. (2d) 817, 827.

We believe that the foregoing demonstrates the insufficiency of the government's evidence to show that Cain was a member of a conspiracy to sell whiskey at overceiling prices.

**7. SINCE CAIN WAS NOT SHOWN TO HAVE BEEN A MEMBER OF THE CONSPIRACY CHARGED, THE ADMISSION IN EVIDENCE OF STATEMENTS AND CONVERSATIONS OF PERSONS NOT IN HIS PRESENCE AND NOT BEFORE THE COURT AS WITNESSES WAS THE ADMISSION IN EVIDENCE OF HEARSAY AND WAS ERROR.**

The improper admission of evidence in this matter is covered by Assignments of Error VII to XV inclusive. (P.R. 54-71.) These Assignments of Error are illustrative of the hearsay nature of the testimony offered and received, over the objections of the defendants. The testimony given by the witnesses mentioned in the Assignments of Error clearly shows that the testimony was very largely hearsay as to this petitioner; was highly prejudicial to his rights and its admission in evidence cannot be construed as harmless error. It would unduly prolong this memorandum to go over the testimony given by these witnesses, who it is claimed have purchased whiskey at over-ceiling prices. However, the testimony given by these witnesses was in each instance, to a very large degree, hearsay as to all and in particular to this petitioner, unless that testimony is construed as evidence of acts by a conspirator committed at the time of the existence and in furtherance of the conspiracy alleged. But even though the conversations had to do with the purchase of liquor, at over-ceiling prices, and even though those conversations may have been held with one person or with more than one person, those facts alone would not make those conversations admissible as to petitioner. The language used by the Court in *People v. Rodriques,* 37 Cal. App. (2d) 290, is apt at this point. In that case the defendants

were charged "with the crime of conspiracy to commit robbery".

> "It appears timely that some consideration be given to the popular but erroneous belief that less convincing evidence is required to support a judgment of guilty where the offense of conspiracy is charged. Such a belief is wholly unwarranted. Moreover, to charge conspiracy produces no advantage for the plaintiff, nor does such a charge create burdens for the defendant, any different with regard to each than might be expected in connection with the trial for other offenses. The crime of conspiracy is no more heinous, nor is it fraught with graver consequences, than other offenses. Fancied handicaps incident to the prosecution of other offenses cannot be overcome in the trial of a criminal action by merely charging conspiracy. Relatively the same quantity and quality of evidence is necessary to support a judgment of conviction of the offense of conspiracy as of any other offense. Moreover, the same rules of evidence apply generally."

In the face of the dilemna with which it was confronted and when objections were made time and again that the testimony offered and received was hearsay as to the defendants on trial, the prosecution was able to get the testimony of all of the liquor purchasers in evidence *by asserting that those purchasers themselves were conspirators.*

At one stage of the proceedings, the defendant Martin Fushslin was asked concerning *his* knowledge as to whether or not he was buying at over the ceiling

price. Objection was made to that testimony and the following occurred:

"The Court. What is your objection?

Mr. Cannon. It is a conclusion of the witness that he knew it was over ceiling. No conversation to that effect.

The Court. He, as an individual, knew it.

Mr. Cannon. But his knowledge wouldn't be binding upon the defendants.

Mr. Licking. Well, I respectfully suggest, if your Honor please, that each one of these purchasers, himself, became *pro tanto* a member of the same conspiracy, if I can prove a conspiracy for this purpose existed.

Mr. Cannon. You mean each one of these purchasers of whiskey became a party to the conspiracy?

Mr. Licking. Everything they did in carrying out this particular conspiracy, certainly. You can't sell it without a purchaser, and you can't offer it for sale unless you have a purchaser." (P.R. 112.)

On such a novel theory, any and everything which any one of these purchasers of whiskey might have said between themselves in the utter absence of all of the defendants, but relating to the purchase and sale of whiskey at over-the-ceiling prices would be admissible against the defendants! The mere statement of the proposition demonstrates its untenability. If these purchasers were in fact conspirators, the indictment should have so alleged; the grand jurors must have known some of them because they actually named James Gibson, Elliott R. Smith, Martin Fush-

slin, Robert C. Thomas, and Frank Spenger, in the alleged overt acts; those men could not have been the conspirators described in the indictment as "divers other persons to said Grand Jurors unknown." (Rep. Tr. 2.)

Proper motions to strike this hearsay evidence were made at the close of the government's case in chief (P.R. 262-267), and were denied by the trial Court (P.R. 267); those motions were renewed and again made at the close of the entire case (P.R. 310-311), and such motions to strike were denied by the trial Court. (P.R. 311.)

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**CONCLUSION.**

We submit, therefore, that the judgment of the Ninth Circuit Court of Appeals, affirming the judgment of the United States District Court for the Northern District, Southern Division, of California should be reversed and this matter remanded to said District Court, with directions to discharge petitioner.

Dated, San Francisco, California,
September 6, 1946.

Respectfully submitted,
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